MBf FINANCE BHD.

v.

GLOBAL PACIFIC TEXTILE INDUSTRIES SDN. BHD. (IN RECEIVERSHIP) & ANOR.

HIGH COURT, TAIPING
DATO' HAJI ABDUL MALIK BIN HAJI ISHAK JC
[ORIGINATING SUMMONS NO. 24-105-93 (T)]
15 SEPTEMBER 1993

LAND LAW: Equipment lease agreement involving two (2) sets of dyeing machines entered into between plaintiff and 1st defendant on 6 February 1991 - First defendant executed two (2) deeds of debentures on 1 June 1990 in favour of Pacific Bank Bhd. and Hongkong and Shanghai Banking Bhd. - Charge by way of fixed charges of all 1st defendant's fixed assets (including all lands) plant, machinery, equipment and motor vehicles together with accessories and parts pertaining thereto - Receivers and Managers appointed on 16 March 1992, by debenture holders - On 16 November 1992, two (2) pieces of land transferred to 1st defendant - Charges in respect of the said land registered in favour of debenture holders pursuant to National Land Code 1965 - Whether dyeing machine affixed to land - Equipment lease agreement terminated for default of rentals and demand made for return of dyeing machines - First defendant refused to return as affixed to land - Whether dyeing machines fixture or chattels - Terms of agreement to be considered - Cause of action in personam - Rights of debenture holders - Whether dyeing machines rightly owned by plaintiff - Whether debenture holders have priority over assets which do not belong to plaintiff - Whether conditions in equipment lease agreement supersedes provision of National Land Code 1965.

This was an application by the plaintiff seeking a declaration against the 1st defendant in respect of the following matters

(a) whether Article 14 of the equipment lease agreement dated 6 February 1991 signed by the plaintiff and GPTI stating, *inter alia*, that the dyeing machines under the equipment lease agreement must continue to be under the ownership of the lessor (plaintiff) **even though they are affixed to the ground on building** supersedes the provisions under the National Land Code 1965;

(b) if yes, whether the plaintiff is entitled to remove the dyeing machines leased by GPTI from the plaintiff **which are affixed on the premises** of GPTI; and

(c) that the costs of these proceedings be paid by GPTI.

Held:

[1] The dyeing machines are chattels and not fixtures and they are installed in the factory temporarily and their removal would not occasion material injury to the land.

[2] The annexing or affixing of the dyeing machines to the said lands were never intended to have the effect of depriving the plaintiff title to it nor was it meant to pass title to the 1st defendant who, in the present case had annexed or affixed the dyeing machines without the plaintiff's consent and permission.

[3] The plaintiff was granted the declarations sought for *viz*: that Articles 14 of the equipment lease agreement supersedes the provisions of the National Land Code 1965. Consequently, the dyeing machines must continue to be under the ownership of the plaintiff even though they are affixed to the ground or building. The plaintiff is, therefore, entitled to remove the dyeing machines from the premises. The costs of the proceedings was ordered to be borne by the 1st defendant.

[Plaintiff's declarations granted. Costs to be borne by 1st defendant].

Cases referred to:

Material Trading Pte. Ltd. (In Liquidation) v. DBS Finance Ltd. [1988] 2 MLJ 162 ***(refd)***
Holland v. Hodgson [1871-72] LR 7 CP 328 ***(refd)***
Leigh v. Taylor [1902] AC 157 ***(refd)***
Spyer v. Phillipson [1931] 2 Ch. D 183 ***(refd)***
Billing v. Pill [1954] 1 QB 70 ***(refd)***
Goh Chong Hin v. Consolidated Malay Rubber Estates Ltd. [1911] 5 FMSLR 86 ***(refd)***
Kiah binti Hanapiah v. Som binti Hanapiah [1953] MLJ 82 ***(refd)***
Chua Sai Ngoh v. Beh Ai Meng [1955] MLJ 167
Monti v. Barnes [1901] 1 QB 205 ***(refd)***
Vaudeville Electric Cinema, Limited v. Muriset [1923] 2 Ch. D 75 ***(refd)***
Billing v. Pill [1953] 2 All ER 1061 at 1063 ***(refd)***
Webb v. Frank Bevis Ltd. [1940] 1 All ER 247 ***(refd)***
Hulme v. Brigham & Anor. [1943] 1 All ER 204 ***(refd)***
Northern Press & Engineering Co. v. Shepherd [1908] 52 Sol J. 715 ***(refd)***
Hobson v. Gorringe [1897] 1 Ch. D 182 ***(refd)***
Reynolds v. Ashby & Son [1904] AC 466 HL ***(refd)***

Re Yorkshire Joinery Co. Ltd. (In Re Liquidation [1967] MLJ 652; The Times, June 2, 1967 ***(refd)***
Gomba Holdings UK Ltd. v. Minorities Finance Ltd. [1988] 1 WLR 1231 ***(refd)***
In Visbond v. FCT [1943] 68 CLR 354 ***(refd)***
Re B Johnson & Co. (Builders) Ltd. [1955] Ch D 634 ***(refd)***
Gosling v. Gaskell [1897] AC 575 (HL) ***(refd)***
Re Magadi Soda Co. Ltd. [1925] 41 TLR 297 ***(refd)***
Smiths Ltd. v. Middleton [1979] 3 All ER 842 ***(refd)***
Bank of New South Wales v. FCT [1979] 54 ALJR 129 ***(refd)***

Legislation referred to:
Companies Act 1965, ss. 191, 292
National Land Code 1965, s. 5
Rules of the High Court 1980, O. 56 r. 2(2)

Other sources referred to:
Introduction to Land Law, J.G. Riddall, 4th Edn., chapter 4, p. 51

For the plaintiff - Leonard Anselm Gomes; M/s. L.A. Gomes & Co.
For the defendant - Ng Sai Yeang; M/s. Raja, Darryl & Loh

JUDGMENT

Haji Abdul Malik bin Haji Ishak JC:
On 6 February 1991, the plaintiff, a company incorporated in Malaysia and having its registered office in Kuala Lumpur entered into an equipment lease agreement involving two sets of semi-automatic jigger dyeing machines, model No. MSJQ-120-950, serial Nos: 91-7 and 91-8 ("the dyeing machines") with the first defendant ("GPTI"), a company incorporated in Malaysia and having its registered office in Kuala Lumpur. Mr. Kenneth Teh Ah Kiam and Mr. Chin Kwai Yoong are, jointly and severally, the receivers and managers of GPTI appointed on 16 March 1992 by the Pacific Bank Berhad and Hongkong & Shanghai Banking Corporation Limited ("the debenture holders") under two deeds of debentures dated 1 June 1990 ("the debentures"). The dyeing machines were to be delivered and kept at GPTI's premises located at Lot 5830, Mukim Assam Kumbang, Kamunting Industrial Estate, 34600 Kamunting, Taiping, Perak (see the equipment lease agreement).

On 1 June 1990, GPTI executed the debentures in favour of the debenture holders, whereby GPTI, among other things, charged by way of fixed charges "all the Company's (GPTI) fixed assets (including all lands) plant, machinery, equipment and motor vehicles wheresoever they may be and including all fixed assets (including all lands), plant, machinery, equipment and motor vehicles hereafter acquired by the Company, together with all equipment, accessories and parts pertaining thereto ..." and by way of floating charges "all the undertaking and the rest of the Company's (GPTI) properties and assets not specified in sub-clause 6.1 (a) hereof whatsoever and wheresoever situate both present and future including but not restricted to stock-in-trade, raw materials, work-in-progress, finished products, goodwill, uncalled capital and book and other debts owing to the Company (GPTI) at any time and from time to time ..." to secure the repayment of all the banking facilities granted under it.

On 16 November 1992 at 10.25 a.m., two pieces of lands held under No. Pendaftaran 2852, No. Lot 5908 **and** No. Pendaftaran 2853, No. Lot 5830, both of Mukim Asam Kumbang, Daerah Larut & Matang, Perak ("the said lands") were transferred from Sri Hartamas Corporation Berhad to Edin Development Limited and finally to GPTI. On 23 September 1986, Sri Hartamas Corporation Berhad was the registered proprietor of the said lands (see the documents of titles).

On 16 November 1992 at 10.25 a.m., charges in respect of the said lands were registered in favour of the debenture holders pursuant to the provisions of the National Land Code.

Incidentally, the dyeing machines were installed on the said lands.

There were persistent defaults in the payment of rentals of GPTI under the equipment lease agreement and consequently, by letter dated 11 August 1992, the plaintiff's solicitors wrote to GPTI and the second defendant (the guarantor under the equipment lease agreement) terminating the equipment lease agreement whilst reserving their rights to damages and other sums due **and** requested for the return of the dyeing machines. There was no reply to this letter by either GPTI or the second defendant. The plaintiff asserts their right under Article 21(1)(b) of the equipment lease agreement to take possession of the dyeing machines or demand its return.

On 10 June 1992, GPTI wrote a letter to the plaintiff and averred that since the dyeing machines were affixed to the said lands, it would not be returned to the plaintiff. The plaintiff's

solicitors replied by letter dated 18 September 1992 to GPTI and focussed on Article 14 of the equipment lease agreement which stated, *inter alia*, that the lessee had contracted out of their rights and the dyeing machines shall continue to be owned by the plaintiff notwithstanding that the dyeing machines were affixed to the said lands. Since there was no reply to the letter dated 18 September 1992, the plaintiff's solicitors wrote a reminder to GPTI by letter dated 5 November 1992 reiterating Article 14 of the equipment lease agreement and requesting for an official reply for the removal of the dyeing machines; there was also an undertaking by the plaintiff to rectify any damage that may be caused to the flooring during the removal of the dyeing machines. On 24 February 1993, GPTI's solicitors replied direct to the plaintiff's solicitors maintaining their stand that the dyeing machines, being fixtures, became part of the land thereby precluding re-possession.

The correspondences between the parties reached an impasse. The plaintiff now seeks a declaration against GPTI in respect of the following matters:

(a) whether Article 14 of the equipment lease agreement dated 6 February 1991 signed by the plaintiff and GPTI stating, *inter alia*, that the dyeing machines under the equipment lease agreement must continue to be under the ownership of the lessor (plaintiff) **even though they are affixed to the ground or building** supersedes the provisions under the National Land Code 1965;
(b) if yes, whether the plaintiff is entitled to remove the dyeing machines leased by GPTI from the plaintiff **which are affixed on the premises** of GPTI; and
(c) that the costs of these proceedings be paid by GPTI.

It is submitted by Mr. Leonard Anselm Gomes on behalf of the plaintiff that the dyeing machines are not fixtures but are chattels; they can easily be removed without doing any damage to the freehold. The annexation was meant to be of a temporary nature by virtue of the fact that the dyeing machines are on lease. It was intended to be temporary and not for the permanent improvement of the building. He submits that Article 14 of the equipment lease agreement leaves no doubt as to the intention of the relevant parties and this Court should not consider attempts by third parties like the receivers and managers who have no knowledge of the intention of the parties, but merely attempt to invoke general principles of land law to try and override the clear intention of the parties. He disputes that the plaintiff's claim against GPTI is solely grounded in an action *in personam*, which remedy lies in damages. It is submitted that the plaintiff's claim against GPTI is based on the equipment lease agreement and that the claim against GPTI would be for arrears of rental and losses suffered as a result of default and that for all intents and purposes the dyeing machines has to be returned to the plaintiff. It is said that the receivers and managers who have been privately appointed by the debenture holders cannot recklessly sacrifice the interests of GPTI for the debenture holders. The debenture holders are properly secured by the fixed and floating assets of GPTI and by the charge over the said lands and this Court cannot sanction the attempt to obtain for the debenture holders the dyeing machines which do not rightfully belong to GPTI. It is further submitted that this Court has an obligation to prevent such wrongful and immoral acquisition of the plaintiff's right to the dyeing machines.

Miss Ng Sai Yeang submits on behalf of GPTI, the receivers and managers and the debenture holders that by virtue of the affixation of the dyeing machines to the ground, the dyeing machines have mutated from its character as a chattel into a fixture forming part of the land as is stipulated in the National Land Code 1965. She further submits that the claims of the debenture holders as holders of security under the debentures and under the charges which are duly registered under the provisions of the National Land Code 1965 ought to be taken into account and in the circumstances, it is submitted that the declarations sought for, ought not to be ordered against GPTI as it would be futile, bearing in mind the claims of the debenture holders. She says that the plaintiff's claim against GPTI is, in any event, an action *in personam* which remedy lies in damages and specific performance of the equipment lease agreement. She submits that what is sought for is not appropriate, *inter alia*, on the following grounds:

(1) that if priority and preference is accorded to the plaintiff it will be in contravention of the provisions of ss. 191 and 292 of the Companies Act 1965; and

(2) that equity will not act in vain as the declarations herein will not be effective nor enforceable in the light of the prior claims of the debenture holders.

It is now trite law that where movables or chattels have been so affixed to land or to buildings on the land with the intention that it is to become part of the land, the chattel loses its nature as a movable and becomes an immovable or fixture and thus land. What is crucial to decide here is this: whether the dyeing machines form part of the land and acquire the character of a fixture? That land comprises fixtures is clear from the definition of "land" in s. 5 of the National Land Code 1965, which includes "all things attached to the earth or permanently fastened to any thing attached to the earth, whether on or below the surface".

The onus is on the plaintiff to prove that the dyeing machines are chattels. To decide whether the dyeing machines are fixtures or chattels is said to be a mixed question of law and fact (*Material Trading Pte. Ltd. (In Liquidation) v. DBS Finance Ltd*. [1988] 2 MLJ 162), **depending on the intention** with which they must be taken to have been placed in the premises. I am fortified in my view by the following passages appearing in the judgment of Blackburn J. in *Holland v. Hodgson* [1871-72] LR 7 CP 328:

> Perhaps the true rule is, that articles not otherwise attached to the land than by their own weight are not to be considered as part of the land, **unless the circumstances are such as to shew that they were intended to be part of the land, the onus of shewing that they were so intended lying on those who assert** that they have ceased to be chattels, and that, on the contrary, an article which is affixed to the land even slightly is to be considered as part of the land, **unless the circumstances are such as to shew that it was intended all along to continue a chattel, the onus lying on those who contend that it is a chattel.**

Put in another way, the question whether a chattel is physically fixed to land is relevant in that the answer determines the burden of proof: for instance, if something is fixed to the land, then *prima facie* it is a fixture, with the result that the burden of proof rests with the party who is seeking to show that it is not a fixture and if he fails to discharge this burden, the item is held to be a fixture. On the other hand, if something is not fixed, then *prima facie* it is not a fixture and the burden of proof rests with the party seeking to show that it is a fixture.

At the outset, I must stress that the English law of fixture (like *Leigh v. Taylor* [1902] AC 157; *Spyer v. Phillipson* [1931] 2 Ch. D 183 and *Billing v. Pill* [1954] 1 QB 70) applies in Peninsular Malaysia (see *Goh Chong Hin v. Consolidated Malay Rubber Estates Ltd*. [1911] 5 FMSLR 86 and compare with *Kiah binti Hanapiah v. Som binti Hanapiah* [1953] MLJ 82; see also *Chua Sai Ngoh v. Beh Ai Meng* [1955] MLJ 167).

It has now come to be accepted that whether a chattel has become a fixture depends on the purpose for which the chattel was introduced onto the land (the test of "purpose"). J.G. Riddall in his book entitled **Introduction to Land Law**, 4th. Edn., chapter 4 at p. 51 has this to say:

> Originally, whether a chattel became a fixture was regarded as depending on whether the chattel had been physically fixed to the land, e.g. by nails or screws, or cement. Since the second half of the last century, it has come to be accepted that whether a chattel has become a fixture depends on the purpose for which the chattel was brought onto the land. If a chattel is placed on land with a view to it being enjoyed in its own right, for example, as an ornament, or an object of utility, then it remains a chattel, irrespective of the fact that it might have been necessary for the chattel to be secured to the land in order to be properly enjoyed or utilised. On the other hand, if a chattel is placed on land with the intention that it would form an integral part of the structure of a building, or part of the architectural design of a building or grounds, then, irrespective of whether it rests by its own weight or is in some way fixed, it becomes a fixture and thus part of the land. **The test, it will be noted, seeks to give effect to the intention of the person who introduced the chattel onto the land.**

Who introduced the dyeing machines onto the land? The plaintiff introduced the dyeing machines onto the land by leasing it to GPTI and their intention, as agreed to by GPTI, is found in the equipment lease agreement itself. It has been urged upon me that Article 14 of the equipment lease agreement leaves no doubt as to the intention and purpose of the relevant parties and this Court should give effect to it.

By its very nature Article 14(1) of the equipment lease agreement **bars** the lessee, in this case **GPTI, without the plaintiff's written**

consent to affix, secure, fasten, anchor or in any way attach the dyeing machines to the premises. Further it provides that if the dyeing machines are affixed to any land or building. **GPTI shall ensure that the dyeing machines shall be capable of being removed** without any material injury to the said lands and steps shall be taken **to prevent title from passing to the owner of the land or building** and **to prevent any chargee or owner of the land or building to acquire interest in the dyeing machines.**

Article 14(2)(a) of the equipment lease agreement provides further that **between the plaintiff and GPTI and their successors in title, the dyeing machines shall remain movable and be in the ownership of the plaintiff** notwithstanding that the same may be affixed to any land or building of which GPTI is the owner or has an estate or interest therein and the dyeing machines shall be deemed not to be a fixture and may be removed by the plaintiff at any time and the plaintiff shall be entitled to enter upon the land or building at any time.

Article 14(2)(b) of the equipment lease agreement imposes a duty on GPTI in that **in the event the land or building is or becomes the subject of a charge, GPTI will have to obtain a written acknowledgment from** the chargee (in this instance, **the debenture holders**) to the effect **that the dyeing machines do not constitute a fixture to the land or building** and to permit the plaintiff to enter upon the land and building and to remove the dyeing machines therefrom.

Article 14(2)(c) of the equipment lease agreement **gives the plaintiff the right to enter and remove the dyeing machines** in the following situation: **when the dyeing machines are affixed, attached or secured to any land or building of which GPTI is not the owner, GPTI shall prior to such affixing, attaching or securing obtain in writing from the owner, to allow the plaintiffs the right to enter and remove** as envisaged in article 14 clause 1, and as between the plaintiff and GPTI, the plaintiff has the same right of entry and removal as envisaged in article 14 clause 2(a) thereof. This **Article removes any doubt that may exist on the question of trespass.**

Article 14(2)(d) of the equipment lease agreement **imposes responsibility on GPTI for any damage caused to the land or building by the affixing or removal of the dyeing machines and GPTI shall indemnify the plaintiff against any claim made in respect of such damage.**

Article 14(3) of the equipment lease agreement **imposes a duty on GPTI to pay** all rents, rates, assessments, taxes and other outgoings in respect of the premises where the dyeing machines may be placed, stored or used.

I have examined the four photographs of the dyeing machines as tendered by both parties through their solicitors. I have also, in the company of both solicitors, the Senior Assistant Registrar of the High Court Taiping, and the representatives from the plaintiff and the debenture holders, visited the factory. At the time of our visit, the plant was not in operation. In fact, the whole factory was at a standstill. I was informed that the dyeing machines were positioned at the same spot as that seen in the photographs. I was also informed that the dyeing machines could not be started as it had been out of commission for quite sometime. My inspection brought forth the following salient points:

(1) The dyeing machines are not bulky or substantial in size but rather small when compared to the other machines, which are heavier and bulkier, that are located under the same building.

(2) The legs of the dyeing machines are cemented into a raised cement platform. These are provisions for easy removal otherwise the legs of the dyeing machines would be embedded into the cement flooring (the photographs also bear the same testimony).

(3) Voidness, immediately below the bottom portion of the dyeing machines.

(4) There are water and steam pipes that run from the dyeing machines to the man-made drains located below the cement floor. The man-made drains must have been erected to facilitate the flow of the water in the factory.

(5) Each of the dyeing machines stood independently by itself, separate from one another, and separate, also, from the other heavier and bulkier machines. In short, the dyeing machines are easily identifiable.

(6) The factory was built not for the sole purpose of housing the dyeing machines. The

dyeing machines could be taken out, at any time, without affecting the operation of the factory (on the assumption that the factory is currently in operation).

(7) Removal of the dyeing machines would not cause material damage to the land.

The submission of Counsel for the plaintiff, that the dyeing machines, though large and substantial, can be removed without causing material injury to the land, seems to be standing on firmer ground when seen in the light of Article 14(1) of the equipment lease agreement especially that part which says that if the dyeing machines are affixed to any land or building, GPTI shall ensure that such dyeing machines shall be capable of being removed without any material injury to the said land and GPTI shall take steps to firstly, prevent title from passing to the owner of the land (here from the evidence, when the equipment lease agreement was signed between the parties, that is, on 6 February 1991, the said lands were still in the name of Sri Hartamas Corporation Berhad); secondly, to prevent any chargee (the debenture holders became chargees on 16 November 1992) or owner of land (Sri Hartamas Corporation Berhad) from acquiring interest in the dyeing machines. It is submitted that the fundamental term of equipment lease agreement being the steps that should be taken by GPTI to prevent title of the dyeing machines to pass and clearly from the available evidence no such steps were taken by GPTI in that direction. Applying the test of purpose, the intention of the plaintiff to introduce the dyeing machines onto the said lands must have been to lease it to GPTI.

It is interesting to note that Article 8 of the equipment lease agreement states that the ownership and title to the dyeing machines after delivery thereto to the lessee (GPTI) shall remain vested in the lessor (plaintiff) and the lessee (GPTI) shall have no right or interest therein otherwise than as a bailee thereto and it is further agreed that the dyeing machines shall at all times remain the sole and exclusive property of the lessor (plaintiff). This Article surely puts an end to any speculation as to what would happen to the dyeing machines after delivery to GPTI.

The rights of the debenture holders under the debentures would appear to be whittled down by Article 30(1) of the equipment lease agreement in that the lease created under equipment lease agreement were said to be between the lessor (plaintiff) and the lessee (GPTI) to the exclusion of third parties and further the lessee (GPTI) shall not be entitled to assign its rights or obligations to third parties.

By virtue of Article 37 of the equipment lease agreement it is said that the agreement between the lessor (plaintiff) and the lessee (GPTI) constitutes the entire contract and supersedes previous arrangements which includes, according to Counsel for the plaintiff, the provisions of the National Land Code 1965 and accordingly the declarations sought ought to be granted with costs. And finally, it is submitted that Article 44 of the equipment lease agreement states that the lease agreement shall bind the successors in title.

The common law *maxim: quicquid plantatur solo, solo credit* (whatever is attached to land, becomes part of land) as opposed to the *maxim: cuius est solum eius est usque ad caelum ad inferos* (he who owns the surface owns everything up to the heavens and down to the depths of the earth) was pressed to its maximum point. Miss Ng Sai Yeang argues that the dyeing machines have been affixed and cemented to the ground (the photographs, however, merely show that the legs of the dyeing machines were cemented into a raised cement platform), and by its very size, large and bulky, would upon removal cause damage to the ground. She concedes, however, that there is a "retention title" clause in the equipment lease agreement but she says that clause is ineffective in law and ought to be disregarded since the dyeing machines have been affixed to the ground.

It must be categorically stated that the degree of annexation and the object of the annexation must be considered (see *Monti v. Barnes* [1901] 1 QB 205 and compare with J.G. Riddal's version his book entitled **Introduction to Land Law** (4th Edn., Butterworths at p. 53 where he said: "The degree of attachment thus provides the *prima facie* result; the purpose for which thing was brought onto the land provides the conclusive result"). Miss Ng Sai Yeang argues that the dyeing machines have been permanently affixed or attached to the land whereas Mr. Leonard Anselm Gomes argues to the contrary. Both parties were emphasising on the degree of annexation or attachment of the dyeing machines to the land. Without going into the niceties and fine distinctions drawn by the

authorities cited before me, I am constrained to say that the question of the degree of annexation or attachment is solely a question of fact for this Court to decide. But it is useful to point out that it is very difficult to say with precision what constitutes annexation. It is a question which must depend on the circumstances of each case. The object of the annexation, on the other hand, can clearly be seen from the equipment lease agreement itself - something which both parties must surely know and realise.

Sargant J. in *Vaudeville Electric Cinema, Limited v. Muriset* [1923] 2 Ch. D 75 especially at p. 83 had this to say in regard to the degree of annexation:

> On the other hand, an article may be very firmly fixed to the land, and yet the circumstances may be such as to shew that it was never intended to be part of the land, and then it does not become part of the land. The anchor of a large ship must be very firmly fixed in the ground in order to bear the strain of the cable, yet no one could suppose that it became part of the land, even though it should chance that the shipment was also the owner of the fee of the spot where the anchor was dropped.
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> In *Lyon & Co. v. London City and Midland Bank* [1903] 2 KB 135, 138, a case of chairs in a place of entertainment and the headnote is as follows: "Chairs were hired from the plaintiffs for use in a hippodrome by the owner and occupier of the building under an agreement for hire containing an option of purchase which was never exercised. The chairs were fastened to the floor of the building by means of screws, in accordance with the requirements of the local authority. Held, that the chairs did not cease to be chattels because they were screwed down to the floor, and that the property in them did not pass as against the plaintiffs to the mortgagee of the freehold under a mortgage of the building and fixtures.

It is pertinent to point out that a chattel on being attached to the soil or to a building *prima facie* becomes a fixture, but the presumption may be rebutted by showing that the annexation is incomplete, so that the chattel can be easily removed without injury to itself or to the premises to which it is attached, and that the annexation is merely for a temporary purpose and for the more complete enjoyment and use of the chattel as a chattel. Has the plaintiff succeeded in discharging their burden to show that the dyeing machines are chattels and not fixtures? I shall revert to this later in the course of this judgment.

In *Billing v. Pill* [1953] 2 All ER 1061 at 1063, Lord Goddard quoted with approval the following passage from Halsbury's Laws as a test for determining whether a property was to be regarded as forming part of the land as a fixture: "whether a chattel has been so affixed to the land or building as to become a fixture depends on the object and purpose of the annexation, and if the chattel can be removed without doing irreparable damage to the premises, neither the method nor the degree of annexation, nor the quantum of damage that would be done to the chattel or to the premises by the removal, affect the question save in so far as they throw a light upon the object and purpose of the annexation. If the object and purpose was for the permanent and substantial improvement of the land or building, the article will be deemed to be a fixture, but if it was attached to the premises merely for a temporary purpose or for the more complete enjoyment and use of it as a chattel, then it will not lose its chattel character and does not become part of the realty.

Next, in *Webb v. Frank Bevis Ltd.* [1940] 1 All ER 247, where a corrugated iron shed, laid on a concrete floor, the framework of the shed being secured to the concrete base by bolts fastened to iron straps fixed in the concrete was held not to be a fixture. Scott LJ delivering the judgment of the Court of Appeal said:

> The condition of the legal quality of removability - namely, that the subject matter should not, by the process of removal, lose its essential character of value (see *Fisher v. Dixon* [1845] 12 C1. & Fin 312; 38 Digest 663 (- was plainly satisfied by the judge's own finding to which I have referred.

In *Hulme v. Brigham & Anor.* [1943] 1 All ER 204, the Court had to consider the question whether six printing machines had become part of the freehold property and therefore passed to the mortgagee thereof. The printing machines stood by their own weight and were not affixed to the floor or to any part of the building but the apparatus driving the machines, parts of which were attached to the machines, was fixed to the freehold. On the evidence, it would be a simple matter to detach the parts of the driving apparatus fixed to the machines and the machines could be dismantled and removed without any unbolting from the floor or the driving apparatus. It was held by Birkett J. that the machines had never lost their chattel nature and were not fixtures and therefore were not comprised in the

mortgage. Birkett J. followed the decision of Eve J. in *Northern Press & Engineering Co. v. Shepherd* [1908] 52 Sol. J. 715, where the owners of certain leasehold premises carried on thereat the business of printers and publishers. They took from the plaintiffs a machine on hire purchase, and subsequently defaulted in payment of instalments on the machine. The defendants, the mortgagees of the premises, took possession of the premises and the plaintiffs claimed the machine on the ground that it was a chattel. The question before Eve J. was whether it was a fixture or a chattel: he held it was the latter. This was what he said:

> It was said that it was a fixture because it was a composite machine, and the agreement (that is the hire purchase agreement) comprised the fixed driving mechanism as well as the patented machine, and the driving apparatus was admittedly affixed to the freehold. But I think I should be introducing a dangerous principle if I were to hold that because a machine is worked by fixed mechanism therefore the machine is a fixture. I must have regard to the nature of the machine. It is complete in itself for the purpose for which it was designed, and I cannot hold that any part of the driving mechanism is part of the machine itself. Then it is said that there are direct and indirect attachments. But it is established by the evidence that not one of the direct attachments really operates to assist the machine in discharging its functions or is necessary for its stability. With regard to the indirect attachment to the motive power, if I were to hold that that constituted a fixture, then every motive power would be a connection which would change a chattel into a fixture. I should be giving too much importance to the connecting link if I were to hold that it altered the character of the machine. I hold, therefore, that the machine is a chattel and belongs to the plaintiffs.

On the other hand, in *Vaudeville Electric Cinema Ltd. v Muriset (supra),* plush tip-up seats in blocks of four or eight attached to the floor of a cinema hall by iron standards with iron feet were held to be fixtures on the ground that they were placed there for the better enjoyment of the cinema hall. Sargant J., at p. 85, said:

> In the present case the chairs were intended for the better enjoyment of the Hippodrome as a building and the object and effect of their annexation was the permanent improvement of the building as a place of public entertainment.

In *Hobson v. Gorringe* [1897] 1 Ch.D.182, the plaintiff let a gas engine to King under a hire purchase agreement which provided that it should not become the property of the hirer until the payment of all instalments and should be removable by the plaintiff upon default of any instalment. King affixed the engine to his land in such a way as to make it a trade fixture. He mortgaged the land to the defendant, who, when King became bankrupt, entered upon the land and took possession of the engine. The plaintiff sued to recover the engine or the proceeds of its sale. His claim was dismissed. Smith LJ said at p. 192:

> It seems to us that the true view of the hiring and purchase agreement, coupled with the annexation of the engine to the soil which took place in this case, is that the engine became a fixture - that is, part of the soil - when it was annexed to the soil by screws and bolts, subject as between Hobson and King to this, that Hobson had the right by contract to unfix it and take possession of it if King failed to pay him the stipulated monthly instalments. In our opinion, the engine became a fixture - that is, part of the soil - subject to this right of Hobson which was given to him by contract. But this right was not an easement created by deed, nor was it conferred by a covenant running with the land. This right, therefore, to remove the fixture imposed no legal obligation on any grantee from King of the land. Neither could the right be enforced in equity against any purchaser of the land without notice of the right, and the defendant Gorringe is such a purchaser.

In *Reynolds v. Ashby & Son* [1904] AC 466 HL, the House of Lords considered the character of machines supplied by their owner to lessee of a factory on hire purchase terms. The machines were affixed to concrete beds in the floor of the factory by bolts and nuts and could have been removed without injury to the building or the beds. The lessee made default in payment and the owner brought an action to recover the machines or their face value from a mortgagee of the premises who had taken possession. It was held that the machines had been so affixed as to pass by the mortgage to the mortgagee. Lord Lindley at p. 473 of the judgment stated thus:

> There is a long series of decisions of the higher authority showing conclusively that as between a mortgage and a mortgagee machines, fixed as they were to land mortgaged, pass to the mortgagee as part of the land.

Finally, in *Re Yorkshire Joinery Co. Ltd.* (*In Re Liquidation* [1967] MLJ 652;. The Times, 2 June

1967), building contractors supplied building materials to a company for use in a factory which they built for the company. The agreement for the supply of the materials stated that the materials on the site, erected or otherwise, remained the property of the contractors until paid for. In May 1965 the contractors completed the work and sent in their bill for 20,437 pound but their bill was not paid. In August 1965 a debenture holder appointed a receiver and manager. In January 1966 the receiver sold the freehold site and the factory, and the proceeds of sale were sufficient to pay off the debenture holder and to leave some surplus. The company went into voluntary liquidation in April 1966, and the receiver was appointed the liquidator. The contractors claimed that they were secured creditors for the 20,437 pound. Plowman J. held that the contractors were unsecured creditors only. The factory became annexed to the land so as to become part of the freehold. The condition in the agreement set out above was clearly meant to apply to a different set of circumstances, and did not apply where materials were annexed to land. The object of the condition was to prevent a judgment creditor from seizing goods belonging to the contractors. The condition applied so long as the materials retained their identity, but not when they became part of the land.

Now, from a consideration of all these cases, it would seem that, although there may be some cases where an article has some degree of physical attachment and yet does not become a fixture, the annexation of a chattel to realty depends mainly on its attachment to the soil or to something attached to the soil, such as a building. Of relevance too, would be, whether the article is attached to the premises for a temporary purpose, and if so, its chattel character will remain intact.

Reverting back to the "retention of title" clause, the dye machines leased by the plaintiff to GPTI was subject to a provision reserving to the plaintiff their title thereto when GPTI breached the equipment lease agreement. This was agreed to by both parties. It is argued, rather convincingly, that the effect of the "retention of title" clause is to prevent the dyeing machines from even becoming a fixture and should remain a chattel. I subscribe to this proposition.

From the analysis of the authorities and the facts of the present case, (especially after visiting the factory). I hold that the dyeing machines are chattels and not fixtures. It is also my finding that the dyeing machines are installed in the factory temporarily and their removal would not occasion material injury to the land. The dyeing machines were leased by the plaintiff to GPTI under the terms of the equipment lease agreement dated 6 February 1991. This was the intention of both parties even though at the material time the said lands were registered in the name of Sri Hartamas Corporation Berhad and not GPTI. It was the duty of GPTI to ensure that the dyeing machines were capable of being removed without causing material injury to the said lands and GPTI must, at that stage, take steps to prevent title from passing to Sri Hartamas Corporation Berhad. And if in the course of removal of the dyeing machines, damage is caused, GPTI must shoulder this responsibility and must indemnify the plaintiff against any claim made in respect of such damage. When charges in respect of the said lands were registered favour of the debenture holders on 16 November 1992, it was imperative on the part of GPTI to obtain a written acknowledgment from the debenture holders to the effect that the dyeing machines are not fixtures. This duty on GPTI's part remains notwithstanding the fact that the debenture holders were appointed on 1 June 1990.

The provisions in the equipment lease agreement must be correlated to the annexation of the dyeing machines and the degree of annexation can then be derived at. That degree of annexation: "the legs cemented into a raised cement platform" and done without the written consent of the plaintiff, in blatant contravention of Article 14(1) of the equipment lease agreement would point to only one conclusion, that the dyeing machines are chattels placed temporarily on the said lands. The annexing or affixing of the dyeing machines to the said lands were never intended to have the effect of depriving the plaintiff title to it nor was it meant to pass title to GPTI who, in the present case, had annexed or affixed the dyeing machines without plaintiff's consent and permission.

Consequently, as chattels, the dyeing machines rightly owned by the plaintiff and the declarations sought would not therefore be futile nor redundant, as alleged, since it could be enforced against GPTI. The debenture holders do not have priority over assets which do not belong to GPTI nor acquired by GPTI. The said lands and other assets belonging to GPTI may be vested in

favour of the debenture holders but the dyeing machines being chattels, rightly belong to the plaintiff.

It is irrelevant to consider the question of indefeasibility of title. GPTI's ownership of the said lands are not disputed nor challenged by the plaintiff.

The plaintiff has two options. One, to recover the dyeing machines; and two, to sue GPTI for damages for breach of the equipment lease agreement. It is entirely the plaintiff's prerogative to adopt any cause of action which they deem fit. The receivers and managers were appointed by the debenture holders, and that being so, they must surely protect the interests of debenture holders rather than that of GPTI. I am of the considered view that the debenture holders should not instruct the receivers and managers as to how to conduct the receivership (*Gomba Holdings UK Ltd. v. Minorities Finance Ltd.* [1988] 1 WLR 1231). Since the receivers and managers were not appointed by the Court, their actions must be scrutinised with care by this Court. They are not officers of the Court and they cannot be called to account as such (see *In Visbond v. FCT* [1943] 68 CLR 354). It has been said that a receiver and manager's primary concern must be to garner, manage and realise the assets charged with a view to liquidating the secured creditor's debt (see *Re B Johnson & Co. (Builders) Ltd.* [1955] Ch D 634 (CA); *Gosling v. Gaskell* [1897] AC 575 (HL)). A receiver has a fiduciary duty to disclose to the debenture holder all the information available to him concerning the receivership: *Re Magadi Soda Co. Ltd.* [1925] 41 TLR 297. He must maintain full accounts for the company: *Smiths Ltd. v. Middleton* [1979] 3 All ER 842). A receiver is bound to comply strictly with the terms of his appointment and must not act beyond his powers (*Bank of New South Wales v. FCT* [1979] 54 ALJR 129). From the facts of the present case, it is not incorrect to say that there were attempts to defraud the creditors, receivers and managers were appointed by the debenture holders on 16 March 1992 on the strength of the debentures dated 1 June 1990. At that point of time, although the debenture holders held a debenture over the factory, the said lands were not registered in GPTI. Between 23 September 1986 to 15 November 1992, the said lands were registered in the name of Sri Hartamas Corporation Berhad but somehow (no evidence was led to explain the phenomenon), Sri Hartamas Corporation Berhad allowed the debenture holders to caveat the said lands. It was only on 16 November 1992 at 10.25 a.m., that a double transfer of the said lands from Sri Hartamas Corporation Berhad to Edin Development Limited and immediately thereafter, to GPTI were effected. At that juncture, GPTI was under the control of the receivers and managers. Thus, on 6 February 1991, when the plaintiff leased the dyeing machines to GPTI, a company under the wings of the receivers and managers, the debenture holders can be said to defraud third parties, in this case, the plaintiff. This Court will certainly not sanction such malpractices. It follows, therefore, that the dyeing machines are chattels and should rightly go to the plaintiff.

I am now shown two letters from the plaintiff, of the same date, that is, 21 March 1992, giving notices to the debenture holders of the existence of the equipment lease agreements between the plaintiff and GPTI in regard to the dyeing machines. This means that the debenture holders knew of the ownership claims by the plaintiff in regard to the dyeing machines and it would, therefore, be inequitable for the debenture holders through their agents, the receivers and managers, to claim ownership of the dyeing machines. The debenture holders are properly secured by the fixed and floating assets of GPTI and the charges over the said lands. This Court cannot sanction the attempts by the debenture holders to grab the dyeing machines which rightly belongs to the plaintiff. This Court has an obligation to prevent such wrongful and immoral acquisition of the dyeing machines.

The dyeing machines were not charged to the debenture holders and therefore they cannot be said to be floating charges in favour of the debenture holders. Consequently, the provisions of ss. 191 and 292 of the Companies Act 1965 are not applicable. It follows, therefore, that the dyeing machines unhindered by floating charges, should rightly go to the plaintiff.

For the reasons adumbrated above, I grant the declarations sought for, *viz:* that Article 14 of the equipment lease agreement supersedes the provisions of the National Land Code 1965 and consequently, the dyeing machines must continue to be under the ownership of the plaintiff even though they are affixed to the ground or building. The plaintiff is, therefore, entitled to remove the dyeing machines from the premises. The costs of these proceedings will be borne by GPTI.

By letter dated 15 September 1993, the defendants through their solicitors applied for the adjournment of the matter into open Court for "further argument". I certify in writing that I do not require "further argument" (O. 56, r. 2(2) of the Rules of the High Court 1980).

Orders accordingly.

NARAYANAN S/O PONNUSAMY

v.

KANNAMAH D/O PONNUSAMY

HIGH COURT, TAIPING
DATO' HAJI ABDUL MALIK BIN HAJI ISHAK JC
[CIVIL APPEAL NO. 11-3-92 (92)]
15 SEPTEMBER 1993

LANDLORD AND TENANT: Claim against appellant for vacant possession of premises erected on state land - Deed of gift given to respondent by her late father - Appellant continued to occupy dwelling house without payment of rental to respondent - Occupation by appellant was without lawful authority of State Government - Section 425 National Land Code 1965 - Whether deed of gift divested dwelling house on State land to respondent - Claim founded on illegality - Appellant did not plead/raise illegality in statement of defence - Effect of failure to plead - Function of pleadings.

PRACTICE & PROCEDURE: Statement of defence did not plead illegality of respondent's claim against appellant - Function of pleadings - Whether appellate Court would take notice of such illegality which is patent on face of statement of claim but not pleaded - Enforceability of illegal contract.

LEGAL PROFESSION: Locus standi of solicitor to appear and argue appeal - Notice of change of solicitor not filed and served - Solicitor who prepared statement of defence different from solicitor at appeal - Status of previous solicitor in view of the fact that notice of change of solicitor not filed and served - New solicitor filed notice of appointment of solicitor instead of notice of change of solicitor - Order 11 r. 1(1)(2), 5(2) of Subordinate Court Rules 1980

This was an appeal the decision of the Magistrate's Court, Taiping which ordered vacant possession of premises erected on state land to the respondent. The appellant who was the occupier of the said premises has lodged this appeal.

Held:

[1] The trial Court in giving judgment to the respondent had blundered and failed to consider that the respondent's claim was founded on an illegality as the dwelling house stood on State land and the deed of gift could not have divested the dwelling house to the respondent. The occupation of the State land was without lawful authority and punishable under s. 425 of the National Land Code 1965.